

April 19, 2013

Ms. Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Ms. Messer:

The East Bay Municipal Utility District (EBMUD) appreciates this opportunity to provide comments on the Delta Stewardship Council's (DSC) Modified Proposed Delta Plan Regulatory Package dated 04/04/2013. As with any California state agency regulations, these regulations must be developed in accordance with the procedural and substantive requirements of the Administrative Procedure Act (APA) and the regulations and guidance adopted by the Office of Administrative Law (OAL). We support the intent of the DSC to promote the achievement of the coequal goals and the objectives inherent in the coequal goals, and provide these comments to help ensure that the regulations meet the OAL standards.

We appreciate that DSC staff made changes to address many of our previous comments as submitted on January 14, 2013. Unfortunately, there are several sections of the regulatory language that are still inconsistent with the standards in the APA, including the "necessity," "nonduplication," and "consistency" standards set forth in Government Code Sections 11349(a) and 11349(f). Our comments on specific sections are set forth below.

Section 5001(h) – The enhanced definition of "coequal goals," which is defined in Water Code Section 85054, includes prescriptive mandates and continues for more than a page, with three "further defined" phrases which have their own separate definitions in Section 5001(h). The second sentence of the definition uses prescriptive regulatory language to express how the goal "shall be achieved" and then the definition goes on to define "achievement," including language establishing prescriptive requirements applicable to "regions that use water from the Delta watershed" and to undefined entities.

While the revisions have sought to clear up some of the ambiguity by stating that "achievement" is defined for purposes of determining whether a plan, program, or project meets the definition of a "covered action," this structure of mixing definitions and regulatory language is confusing to the potentially regulated community, and in so doing does not meet a reasonable standard of clarity.

Because "coequal goals" is already defined by statute, there is no necessity to define "achieving the coequal goals." Subparagraphs (h)(1)-(3) appear to be expressing DSC's aspirations or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any necessary clarity to the

definition of “coequal goals” already set forth in the statute. This language is narrative and descriptive in nature, and as such should be confined to the Delta Plan.

Section 5001(j) – Covered action defined. Similar to the enhanced definition of “coequal goals,” this enhancement of the definition of “covered action,” which is already defined in Water Code Section 85057.5, sets forth substantive regulatory requirements that are unclear.

Section 5001(j)(3) includes prescriptive requirements applicable to state and local public agencies that should not be included within a “definition”. We question the necessity for including the statement that a determination is subject to judicial review, or that the determination must be reasonable, made in good faith, and consistent with the Delta Reform Act because these are simply reiterations of the requirements of Water Code Section 85225 or processes set forth in statute.

Section 5001(j)(4) is “not readily understandable”, as required by the OAL standards. The section is simply not comprehensible and should be deleted or clarified.

Section 5001(y) – Proposed Action Defined. It is not clear that there is any need for a separate definition of “proposed action” in Section 5001, particularly if this term is defined as meaning all plans, programs, or projects meeting the covered action screening criteria.

Section 5001(bb) – The definition of “restoration” or “restoring” merely references the statutory definition set forth in Water Code Section 85066 in order to define a term set forth in the lengthy and confusing enhanced definition of “coequal goals.” This separate definition does little to interpret or carry out the statutory provisions and should be removed.

Section 5001(dd) – The definition of “significant impact” improperly includes both changes that positively impact the achievement of one or both of the coequal goals and changes that are directly or indirectly caused by a project “when the project’s incremental effect is considered together with the impacts of other closely-related past, present, or reasonably foreseeable future projects.” Rather than remedying the problems in the original text with regard to the inclusion of impacts that, when considered cumulatively in connection with the effects of past projects, other current projects, and probable future projects, would have a substantial impact on the achievement of one or both of the coequal goals, the change to the definition has made the language less clear. There is no support in the Delta Reform Act language for including projects result in minor or negligible impacts within the definition of “covered actions.” The Delta Reform Act defines “covered actions” to be actions that will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs. It is improper to expand this definition to include projects with minor or de minimis impacts. There is no support for including a project within the definition of a “covered action” solely because the project will have a minor impact that may be

greater when it is considered together with other past projects, particularly if the past project is undertaken by a different state or local agency. It is also not clear what projects would be deemed to be “closely-related past, present, or reasonably foreseeable future projects.” The text does not explain whether these are projects that are closely-related geographically, or closely-related in time, and thus it will be difficult for state and local agencies to understand the scope of this provision.

If the Council determines that it is necessary to define “significant impact” in these regulations, we urge the adoption of a definition consistent with Section 15382 of the CEQA Guidelines. “Significant impact” should be defined as “a substantial adverse change in baseline conditions.” This is consistent with the intent of Water Code Sections 85031 and 85032, which state that the Delta Reform Act does not alter CEQA or supercede or modify certain other provisions.

Section 5001(dd)(3) indicates that one-year transfers will not have a “significant impact” and are therefore not considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5001(dd)(3) sunsets the exemption on 1/1/2017, a limitation that is not consistent with Section 1729 of the Water Code. This creates a potentially confusing regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review.

The last sentence of Section 5001(dd)(3), starting with “The Council contemplates...” is simply a narrative expression of the Council’s intent and is unnecessary. It does not provide clarity for the regulated community and does not meet the standard of necessity for regulatory language.

Section 5001(dd)(4) creates a confusing, circular, and illogical definition. Section 5001(dd) defines a “significant impact” and includes subsections (1)-(4) that are defined NOT to have a significant impact. However, subsection (4) then refers back to (dd) for “unusual circumstance indicating a reasonable possibility that the project will have a significant impact... as further defined by Section 5001(dd) of this Chapter.” In simple terms, the definition says the following items (1)-(4) are exempt, unless they aren’t. Furthermore, the terms “unusual circumstance” and “reasonable possibility” are vague. This is unacceptable regulatory language and does not meet the standards of necessity or clarity.

Section 5002 – Detailed Findings to Establish Consistency with the Delta Plan.

Subsection 5002(a) specifies a “policy” that “applies” after a “proposed action” (a term that is defined as the equivalent of a “covered action”) has been determined to be a “covered action” because it is controlled by one or more of the “regulatory policies” set forth in the article that follows this section. This language is narrative and unnecessary.

The statutory basis for the requirements in Section 5002(b)(2) should also be more clearly explained. It is not clear whether this provision is intended to require a certificate of consistency to include mitigation measures beyond those required by CEQA. If this is the case, then the basis for the requirement should be further explained. Otherwise, it should be made clear that applicable mitigation measures are only those feasible mitigation measures or substitute measures necessary to reduce the impacts to a level that no longer results in a significant impact to the coequal goals or the implementation of flood control measures.

Section 5003. Reduce Reliance on the Delta - Section 5003(a) sets forth a general prescription applicable to exports from the Delta, transfers through it, or use from it. The language does not specify the entities to which it applies or how it will be enforced, and Section 5003(b) does little to add these necessary details or clarify the intent of the section.

Section 5003(c)(1) misrepresents the established uses of urban and agricultural water management plans. These plans are long-range planning documents that change over time as conditions and technologies change, and, as noted in the language, DWR is charged with reviewing them and determining compliance with the statutory requirements. The implementation schedules set forth in the plans are goals established by the water suppliers and are intended to adapt to changing circumstances. In order to protect the integrity of the water management plan as a useful planning document, all references to implementation should be deleted. Subsection 5003(c)(1)(B) should be revised as follows: "Identified and evaluated all programs and projects in the Urban or Agricultural Water Management Plan that are locally cost effective, technically feasible, and which would reduce reliance on the Delta."

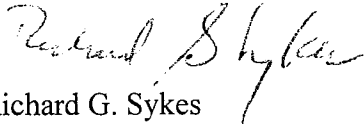
Section 5003(c)(2) appears to be entirely a narrative list setting forth programs that could reduce reliance on the Delta and it provides no regulatory purpose. For the sake of clarity it should be deleted.

Section 5004. Transparency in Water Contracting – The provisions in Section 5004(a)-(b) are duplicative, unnecessary, and unclear. The statement of reasons indicates that the "lack of accurate, timely, consistent, and transparent information on the management of California's water supplies and beneficial uses is a significant impediment to the achievement of the coequal goals." However, the solution proposed by the regulatory language is simply to reiterate existing state and federal policies and regulations that are enforced by other agencies. Furthermore, the regulatory package provides no documentation or evidence suggesting that the existing state and federal policies and regulations are not currently being enforced. As such, this entire section is inconsistent with both the standards of necessity and nonduplication. This section is not necessary, as there is no evidence that the existing policies and regulations are not currently being implemented and enforced, and it is also not clear that these policies and regulations, or the statutes pursuant to which they were adopted, can be enforced by the Council.

Ms. Cindy Messer
April 19, 2013
Page 5

We appreciate this opportunity to provide comments on the regulatory package. As noted above, we also acknowledge and support the efforts being undertaken to promote the achievement of the coequal goals and establish a governance structure to coordinate state agency efforts and authorities. If you have any questions regarding our comments, please contact Doug Wallace at 510-287-1370.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard G. Sykes".

Richard G. Sykes
Director of Water and Natural Resources

RGS:DW:PGS:dc